

GRYNBERG PETROLEUM CO.

IBLA 93-541

Decided November 29, 1996

Appeal from a decision of the Colorado State Office, Bureau of Land Management, upholding an assessment for failure to timely abate a violation on lease COC 1727. INC 93-56; SDR-CO-93-11.

Affirmed as modified.

1. Oil and Gas Leases: Civil Assessments and Penalties--Oil and Gas Leases: Incidents of Noncompliance

Under 43 CFR 3163.1(a)(2), BLM may properly assess an oil and gas operator liquidated damages in the amount of \$250 for failure to abate a minor violation within the time allowed in an incident of noncompliance. An oil and gas operator challenging a determination that it did not timely abate an incident of noncompliance bears the burden of establishing by a preponderance of the evidence that the determination is erroneous.

APPEARANCES: Jack J. Grynberg, President, Grynberg Petroleum Company, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Grynberg Petroleum Company (Grynberg) has appealed from a June 11, 1993, decision of the Deputy State Director, Mineral Resources, Colorado State Office, Bureau of Land Management (BLM), upholding the April 30, 1993, notice of incident of noncompliance (INC) (INC 93-56) issued by the Little Snake Resource Area Manager, BLM, assessing Grynberg \$250 for failure to timely abate the minor violation cited in an April 1, 1993, INC (INC 93-48).

Grynberg operates Federal oil and gas lease No. COC 1727 which embraces approximately 1,243.94 acres in secs. 14, 24, and 25, T. 9 N., R. 91 W., sixth principal meridian, Moffat County, Colorado. On March 20, 1992, BLM approved Grynberg's application for permit to drill the #6-24 Federal well in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 24, T. 9 N., R. 91 W., sixth principal meridian. An inspector from the Little Snake Resource Area, BLM, examined the #6-24 Federal well on April 1, 1993, and discovered that the fence around the water disposal pit had not been completed. He, therefore, issued INC 93-48 on that date, citing Grynberg with the minor violation of

failing to have a fence on the west side of the NTL-2B pit 1/ and requiring corrective action within 20 days. Grynberg received INC 93-48 on April 5, 1993, as indicated by the return receipt card in the file.

On April 30, 1993, BLM reinspected the well, found that the fence still had not been completed around the water disposal pit, and issued INC 93-56 ordering Grynberg to complete the fencing of the pit and assessing the company \$250 for the failure to comply with INC 93-48. The abatement period for INC 93-56 initially ended on May 20, 1993, but on May 7, 1993, Grynberg requested and received an extension to June 21, 1993.

On May 7, 1993, a Grynberg representative signed and returned INC 93-48 to BLM, stating that the fence had been rebuilt on May 3, 1993.

Grynberg sought State Director review (SDR) of INC 93-56 pursuant to 43 CFR 3165.3(b), requesting rescission of the \$250 assessment for noncompliance. Grynberg asserted that its engineer, Ken McKinney, had called BLM on April 15, 1993, to request an extension of time to build the fence due to the extremely wet conditions and virtually impassible roads which had rendered it impossible to reach the site to build the fence within the abatement period established in INC 93-48. Grynberg claimed that although McKinney asked to speak with Bill Gilbert, Gilbert was not in the office so McKinney spoke with Fred Conrath who verbally granted an extension on INC 93-48 until May 9, 1993. Grynberg suggested that there must have been a miscommunication between Conrath and Gilbert, with Conrath failing to inform Gilbert of the extension, and that this communication breakdown led to Gilbert issuing INC 93-56 and assessing \$250 prior to the extended May 9, 1993, abatement date for INC 93-48.

On June 11, 1993, the Deputy State Director issued his decision upholding INC 93-56. He found that the Little Snake Resource Area Office had no record of a verbal extension of the abatement period for INC 93-48 to May 9, 1993, nor did Conrath recall an April 15, 1993, extension request for INC 93-48 although he did remember and document his April 15, 1993, approval of an extension of time for INC 93-43. The extension for INC 93-43, the Deputy State Director added, had been confirmed by McKinney in a letter dated April 15, 1993. Accordingly, the Deputy State Director concluded that

[t]he abatement period for INC 93-48 ended April 22, 1993, with no abatement and no extension. On April 30, 1993, INC 93-56 (with \$250 assessment) was issued for noncompliance

1/ NTL-2B prescribes the requirements applicable to the disposal of water produced on Federal and Indian oil and gas leases and authorizes BLM to order the fencing of surface pits to prevent livestock or wildlife entry to the pits. 40 FR 57814, 57815 (Dec. 12, 1975).

with INC 93-48. INC 93-56 was issued because the fence that had been ordered completed in INC 93-48 had not been completed by April 22, 1993. The case file shows that the fence had still not been completed May 7, 1993, when you requested by phone, and were granted, an extension to complete the work by June 21, 1993.

The assessment for failure to comply with the original INC is still in effect. The order of the Authorized Officer (INC 93-56) is upheld and the assessment of \$250 must be paid to prevent further noncompliance.

(Deputy State Director Decision at 2).

On appeal Grynberg reiterates that, on April 15, 1993, McKinney requested an extension of time to complete the fence necessary to correct the violation cited in INC 93-48 because the roads to the site were essentially impassible due to the extremely wet conditions, and that Conrath verbally extended the abatement period for the INC until May 9, 1993. Grynberg avers that the fence was built on May 3, 1993, well within the extended compliance period. 2/ Grynberg suggests that confusion exists as to whether the 20-day correction period denotes working days or calendar day, calculating that, on a working day basis, the due date for abatement would have been May 4, 1993, and its May 3, 1993, compliance would have been timely. Even if time for abatement included calendar days, Grynberg asserts that the original abatement period for INC 93-48 ended on April 26, 1993, not on April 22, 1993, since the company did not receive the INC, which ordered abatement within 20 days of receipt of the notice, until April 6, 1993, and that this period was extended verbally to May 9, 1993. Grynberg concludes that the verbal miscommunication between BLM personnel regarding the extension, the confusion over whether the original abatement period included calendar or working days, and the error in the record concerning the date the fence was actually completed demonstrate that BLM issued INC 93-56 with the \$250 assessment either prematurely or erroneously based on miscommunication and misinformation, and that the Deputy State Director's decision must, therefore, be overturned.

2/ Grynberg disputes the Deputy State Director's finding that the fence had not been completed by May 7, 1993, when the company requested an extension until June 21, 1993, to complete the work required by INC 93-56.

Grynberg explains that the extension request, which was one of many sought at the same time, was made as a precautionary measure because the person responsible for handling INC's was out in the field. Grynberg has submitted the sworn affidavit of the employee who built the fence attesting that the fence around the NTL-2B pit at the 6-24 Federal well was completed at 10:00 a.m. on May 3, 1993. We find this evidence sufficient to establish that the violation cited in INC 93-48 was corrected on May 3, 1993, and modify the Deputy State Director's decision to the extent it conflicts with this conclusion.

[1] Under 43 CFR 3163.1(a)(2), BLM may assess an oil and gas operator \$250 for failure to abate a minor violation within the time allowed in an INC. See Craig McGriff Exploration, Inc., 132 IBLA 365, 370 (1995); Jack J. Grynberg, 125 IBLA 259, 260 (1993); Joseph B. Gould, 120 IBLA 237, 239 (1991), and cases cited. Such an assessment is not considered a fine or a penalty; rather, it is in the nature of "liquidated damages" to cover loss or damage to the lessor from specific instances of noncompliance. 3/ Craig McGriff Exploration, Inc., *supra*; Petro-X Corp., 127 IBLA 111, 117-18 (1993); Fancher Oil Co., 121 IBLA 397, 400 (1991). It is well established that BLM is entitled to assess liquidated damages when an operator fails to comply with a written order of the authorized officer within the time period specified in that order. Craig McGriff Exploration, Inc., *supra*; Petro-X Corp., *supra*; Onimex Petroleum, Inc., 123 IBLA 1, 4 (1992). The law is equally settled that an oil and gas operator challenging BLM's determination that the cited violation was not abated within the allotted period bears the burden of establishing by a preponderance of the evidence that the determination is erroneous. Petro-X Corp., *supra*; Jack J. Grynberg, *supra* at 261; Onimex Petroleum, Inc., *supra*; Fancher Oil Co., *supra* at 402. Grynberg has not met this burden.

As an initial matter, we reject Grynberg's assertion, raised for the first time on appeal, that confusion existed over whether the 20-day abatement period prescribed in INC 93-48 denoted working days or calendar days. Not only does this Board generally refuse to review issues not addressed in the appealed decision (see Henry A. Alker, 62 IBLA 211, 212 (1982)), but it is clear from the language of the INC itself that when BLM means working days, it uses the term "working days." See, e.g., INC's Review and Appeal Rights paragraph requiring the filing of a request for SDR within "20 working days" of receipt of the INC. Additionally, Grynberg's failure to raise the alleged confusion earlier in this proceeding and its claim that it requested an extension because the weather conditions in April 1993 rendered timely compliance impossible further undermine its belated suggestion that the required corrective action did not need to be completed until May 4, 1993.

We agree, however, that the abatement period for INC 93-48 ended on April 25, 1993, not April 22, 1993, as stated in the Deputy State Director's decision. The INC explicitly states that the cited violation "must be corrected within the prescribed time from receipt of this Notice."

Since Grynberg received the INC on April 5, 1993, the corrective action should have been completed by April 25, 1993. We, therefore, modify the Deputy State Director's finding that the abatement period ended on April 22, 1993.

3/ Civil penalties may be imposed under 43 CFR 3163.2 where the violation remains uncorrected.

In any event, we find that Grynberg built the required fence on May 3, 1993, after the abatement period set out in INC 93-48. Although Grynberg insists that it received an extension of the abatement period until May 9, 1993, the record is devoid evidence indicating that such an extension for INC 93-48 was sought or granted. The case file does contain an April 15, 1993, Confirmation/Report of a telephone conversation between Grynberg's engineer McKinney and BLM's Conrath documenting McKinney's request for, and Conrath's agreement to, a 10-day extension for abating INC 93-43 on well #4-24 due to the poor road conditions to the well site. This 10-day extension for the abatement of INC 93-43 was confirmed in an April 15, 1993, letter from McKinney to BLM. Accordingly, we find that BLM properly determined that Grynberg failed to timely comply with INC 93-48's directive to complete the fence around the water disposal pit and uphold the issuance of INC 93-56 and the \$250 assessment.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Deputy State Director's decision is affirmed as modified by this decision.

Will A. Irwin
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge